Nos. 186, 187

In the Supreme Court of the United States

OCTOBER TERM, 1951

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, ETC., PETITIONER

v.

ROANE-ANDERSON COMPANY, UNITED STATES, ET AL.

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v.

CARBIDE AND CARBON CHEMICALS CORP., UNITED STATES, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE UNITED STATES, INTERVENOR-RESPONDENT

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OPINIONS BELOW

The majority, concurring, and dissenting opinions of the Supreme Court of Tennessee (R. in No. 186, at 6-30; R. in No. 187, at 5-29) are reported

at 239 S. W. (2d) 27. The opinion of the Chancery Court of Davidson County, Tennessee (R. in No. 186, at 50-59; R. in No. 187, at 47-56) has not been reported.

JURISDICTION

The judgments of the Supreme Court of Tennessee were entered on March 9, 1951 (R. in No. 186, at 1-4; R. in No. 187, at 1-4). By order of Mr. Justice Reed, dated May 17, 1951, the time for filing petitions for writs of certiorari was extended to and including August 6, 1951 (R. in No. 186, at 249; R. in No. 187, at 247). The petitions for writs of certiorari were filed on July 13, 1951, and were granted on October 15, 1951 (R. in No. 186, at 249; R. in No. 187, at 247).

QUESTION PRESENTED

Whether the purchase and use of materials and supplies by cost-type contractors of the Atomic Energy Commission, in the performance of their contracts, are exempted by Section 9(b) of the Atomic Energy Act of 1946 from Tennessee's sales and use taxes.

STATUTES INVOLVED

Section 9(b) of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755 (42 U. S. C. 1809 (b)), provides as follows:

> (b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired

property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

Other portions of the Atomic Energy Act of 1946 are reprinted in the Appendix, *infra* pp. 60-68, together with pertinent portions of the Tennessee Retailers' Sales Tax Act.

STATEMENT

In 1947, Tennessee adopted its Retailers' Sales Tax Act. Chap. 3, Public Acts of 1947. The statute imposes (a) a *sales tax* on the sale and purchase of certain materials and supplies in Tennes-

see, and (b) a *use tax* on the use within the state of certain materials and supplies purchased elsewhere. The present cases arise out of the imposition by the State of these sales and use taxes in connection with materials and supplies sold to, or used by, cost-type contractors with the Atomic Energy Commission.

1. *The proceedings below:* In the Fall of 1947, respondents Roane-Anderson Company and Carbide and Carbon Chemicals Corporation—both cost-type contractors with the Atomic Energy Commission (*infra*, pp. 7-12)—paid under protest amounts demanded by petitioner, the State Commissioner of Finance and Taxation, as use taxes on the use of equipment purchased by these respondents in interstate commerce, which was delivered to them at Oak Ridge, Tennessee, and used by them in the performance of their contracts with the Commission (R. in No. 186, at 7, 11, 51; R. in No. 187, at 6, 10, 48). At about the same time, respondents Wilson-Weesner-Wilkinson Company and Diamond Coal Mining Company—both of whom are merchants engaged in business in Tennessee—paid under protest sums demanded by petitioner as sales taxes on the sale to, and purchase by, respondents Roane-Anderson Company and Carbide and Carbon Chemicals Corporation, of certain goods (a machine and some coal) used by the latter companies in the performance of their contracts with the Commission (R. in No. 186, at 7, 11, 51; R. in No. 187, at 6, 10, 48).

Four suits were thereupon brought by the four companies, in the Chancery Court of Davidson County, to recover these taxes, as well as for an injunction restraining the application of the state sales or use tax to similar transactions. Roane-Anderson Company and Carbide and Carbon Chemicals Corporation each brought suit to recover the use taxes paid by them (R. in No. 186, at 11, 31-38, 51; R. in No. 187, at 10, 30-37, 48). Wilson-Weesner-Wilkinson Company and its vendee, Roane-Anderson Company, sued to recover the sales taxes paid initially by the vendor and then collected from the purchaser (R. in No. 186, at 11, 51, 88-96). Likewise, Diamond Coal Mining Company and its vendee, Carbide and Carbon Chemicals Corporation, brought an action to recover the sales taxes paid initially by the vendor and then collected from the purchaser (R. in No. 187, at 10, 48, 89-97).

The burden of the plaintiffs' position was that the taxes could not be validly imposed because of (a) the exemption from taxation accorded the Atomic Energy Commission and all "activities * * * of the Commission" by Section 9 (b) of the Atomic Energy Act and (b) the constitutional immunity of the United States and its agencies and instrumentalities from such taxation. Adopting the same position as the contractor plaintiffs, the United States sought leave to intervene as an interested party, and such intervention was allowed in

each case (R. in No. 186, at 7, 47-8, 48-9, 51-2, 105, 105-106; R. in No. 187, at 6, 46, 46-7, 49, 105, 106, 106-107).

Petitioner filed answers contending that the taxes were properly collected (R. in No. 186, at 39-45, 97-103; R. in No. 187, at 38-44, 98-104). After a trial, at which evidence was presented as to the terms, nature, and operation of the Commission's cost-type contracts, and the function of its cost-type operators such as the Roane-Anderson Company and Carbide and Carbon Chemicals Corporation, the chancellor held that both the sales and the use taxes were properly imposed (R. in No. 186, at 50-59; R. in No. 186, at 47-56). Decrees were accordingly entered dismissing the four bills and the United States' intervening petitions (R. in No. 186, at 85-87, 107-109; R. in No. 187, at 86-88, 107-110). Findings of fact were also made (R. in No. 186, at 68-84; R. in No. 187, at 67-85).

The substance of the chancery court's holding was that the Roane-Anderson Company and the Carbide and Carbon Chemicals Corporation are independent contractors with the Atomic Energy Commission, and sales to, or use of materials by, them are not exempt from state taxation either under the Federal Constitution or under Section 9(b) of the Atomic Energy Act (R. in No. 186, at 50-59; R. in No. 187, at 47-56).

On appeal, the Supreme Court of Tennessee reversed, holding that the State's sales and use taxes could not validly be imposed (R. in No. 186, at 1-4;

R. in No. 187, at 1-4). The majority of the court agreed with the chancery court that the challenged taxes were not forbidden by the Constitution, standing alone, but held that they were prohibited by Section 9(b). Two judges dissented (R. in No. 186, at 6-30; R. in No. 187, at 5-29).

2. *The relationship of Roane-Anderson Company and Carbide and Carbon Chemicals Corporation to the Atomic Energy Commission:* The memorandum which is being filed on behalf of the contractor respondents describes in detail (a) the functions performed by Roane-Anderson Company and Carbide and Carbon Chemicals Corporation at Oak Ridge, (b) the relationship between those companies and the Atomic Energy Commission, (c) the terms of their contracts with the Commission, (d) the general course of operations under those contracts, and (e) the purchasing and procurement policies and practices of those contractors. In this brief we shall merely summarize the salient facts, as found by the courts below:

a. *Roane-Anderson Company.* The Roane-Anderson Company, which was organized for the specific purpose, entered into a contract with the Manhattan District of the Corps of Engineers in February 1944, pursuant to Title II of the First War Powers Act, by which it agreed to manage, on a cost-plus-fixed-fee basis, the newly-created Government town of Oak Ridge, Tennessee, at which half of the Government's atomic energy plants

were located (R. in No. 186, at 9-10, 11, 69-70). Pursuant to the Atomic Energy Act of 1946, this contract was transferred, as of midnight, December 31, 1946, to the Atomic Energy Commission, and has been continued in force (R. in No. 186, at 70).

Under the contract, the Company agreed to "manage, operate, and/or maintain facilities, utilities, roads, services, properties, and appurtenances situated within" Oak Ridge. It has operated the town bus-system, cafeterias, dormitories, and the hospital, all of which were Government-owned. At the present time, the company manages the Government-owned housing facilities, maintains the roads and streets, and the utility systems, and obtains concessionaires to operate businesses in Oak Ridge using Government-owned facilities and on Government-owned property. It also does certain maintenance and repair service on other Government-owned buildings and properties, and hires such municipal-type employees as policemen and firemen (R. in No. 186, at 9-10, 11, 71-73).

In the performance of its contract, the Company is always under the direct supervision and direction of the Government's contracting officer (R. in No. 186, at 13, 75), and this control is implemented in various ways. For instance, the Government has a large measure of direct control over the hiring, dismissal, and compensation of employees (R.

in No. 186, at 78); it must approve the rates and charges paid by those benefiting from or using Government property managed by the Company (R. in No. 186, at 77); it inspects and audits the Company's records and accounts (R. in No. 186, at 13).

As for procurement, the contract expressly provides that in the operation of the facilities and the procurement of all supplies the Company shall act as agent for the United States (R. in No. 186, at 75-6). At the time of the transactions involved here, all purchases over $2500 had to receive prior Government approval (R. in No. 186, at 75-6).[1] The purchase orders indicate that the purchase is made as agent for the Government (R. in No. 186, at 76, 82), and sellers are directed to ship to the Atomic Energy Commission, care of Roane-Anderson Company (R. in No. 186, at 80). Under the contract with the Government, title to all materials purchased under the contract and for which the Company is entited to reimbursement "shall vest in the Government at such point or points as the contracting officer may designate in writing" (R. in No. 186, at 81). As a matter of practice, title to acquired materials and supplies has never been considered to be in the contractor, but has always been treated as having passed to the Government at the time title passed from the vendor (R. in No. 186,

[1] In 1949, the contract was amended to raise this figure to $10,000 (Exhibit 32, Article VIII, par. 3(c); see R. in No. 186, at 245-246).

at 14).[2] Roane-Anderson Company owns none of the real or personal property which it operates, manages, or uses in the performance of its contract (R. in No. 186, at 10, 13, 14, 244-245).

The Company is to be reimbursed for all costs and expenses, including the cost of purchased materials and the taxes involved here (R. in No. 186, at 13-14, 77, 78). Reimbursement is ordinarily made out of the revenues the Company collects for the Government at Oak Ridge, as well as out of moneys advanced by the Government (R. in No. 186, at 14, 79-80). The Company has been reimbursed for the taxes which are the subject of this suit (R. in No. 186, at 83).

b. *Carbide and Carbon Chemicals Corporation.* In November 1943, respondent Carbide and Carbon Chemicals Corporation entered into a contract with the Manhattan District of the Corps of Engineers, under Title II of the First War Powers Act, to operate certain Government-owned atomic energy plants at Oak Ridge (R. in No. 187, at 8-9, 68). The contract was on a cost-plus-fixed-fee basis. Like the Roane-Anderson contract, it was transferred to the Atomic Energy Commission as of midnight, December 31, 1946 (R. in No. 187, at 69).

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[2] As of October 1, 1948, the contract was amended to provide specifically that title to acquired property should pass directly from the vendor or supplier to the Government at the delivery-point or at such other point as the Commission might designate in writing (Exhibit 32, Article IX; see R. in No. 186, at 245-246).

The Corporation agreed to operate for the Government the plants then being built for the production of U-235, to carry on research and experimental work, to provide consultant services, and to train personnel (R. in No. 187, at 9-10, 70-71). Under this agreement, the Corporation has operated for the Commission all of the Government-owned plants and facilities at Oak Ridge for the production of fissionable materials, and since 1948 it has also operated the Oak Ridge National Laboratory. It also carries on a research and development program (R. in No. 187, at 9-10, 72). The Corporation's work is subject to close and detailed supervision by the Commission (R. in No. 187, at 12, 83).

All raw materials processed in the plants operated by the Corporation are supplied by the Commission (R. in No. 187, at 76), but the contractor purchases other supplies and equipment for which it is entitled to reimbursement (R. in No. 187, at 74, 79). In 1947, purchases of more than $2000 had to be approved by the Government (R. in No. 187, at 79, 81).[3] The contract requires that the Corporation place orders in its own name, and not bind the Government; the Corporation has placed a statement to that effect in its purchase orders, as well as the statement that its "only liability hereunder shall be to pay for materials or services

[3] After the transactions involved here, the contract was amended to require approval only for purchases in excess of $100,000 (Exhibit 31, p. 6; see R. in No. 187, at 243-244).

ordered hereunder out of funds supplied by the United States Government * * *" (R. in No. 187, at 55-6, 81). The title provision is the same as in the Roane-Anderson contract (R. in No. 187, at 75, 79-80), and the practice with respect to passage of title to materials and supplies has been the same (R. in No. 187, at 13). *Supra*, pp. 9-10.[4] As with Roane-Anderson, Carbide owns none of the real or personal property making up the plants or used in the operation of the plants. (R. in No. 187, at 9, 12, 13, 241-242).

The Corporation has not used any of its own funds, and has secured payment and reimbursement from direct payments by the Government as well as from funds advanced to it by the Government (R. in No. 187, at 12-13, 74, 77-79). The taxes involved here were paid with Government monies (R. in No. 187, at 84).

SUMMARY OF ARGUMENT

We maintain that Section 9 (b) of the Atomic Energy Act, which "expressly" exempts from non-federal "taxation in any manner or form" the "activities * * * of the Commission" (as well as the Commission itself, its property, and income) prohibits state taxation of sales to, or use of materials by, the Commission's cost-type contractors. This is true regardless of whether these contractors are independent contractors or agents, and regard-

[4] As of October 1, 1948, the title provisions of the contract were modified in the same fashion as those of the Roane-Anderson contract. See fn. 2, *supra*, p. 10.

less of whether they would be entitled to constitutional immunity in the absence of a Congressional exemption.

A. Such tax exemption provisions are clearly within the power of Congress, and the State does not challenge the validity of the exemption if it is held to bar the taxes imposed here. The sole issue is one of the purpose and intent of Congress in establishing the exemption.

B. This Court's decisions lay down the principle that broadly-phrased federal exemption clauses of this type should be given a "broad construction" which pays close attention to "practical operation and effect", and does not "fritter away" the protection Congress thought it granted. See *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 31; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 673, 675. The emphatic tone and broad wording of Section 9 (b) are in full harmony with these admonitions, and likewise indicate that the major premise of interpretation should be that Congress meant to accord a wide freedom from state and local tax burdens.

C. In this light and under the Act's wording, it is entirely appropriate to read the exemption of the Commission's "activities" as including the purchases and uses involved here. There is certainly no linguistic barrier to treating the work

done by the contractors as part of the Commission's "activities". Roane-Anderson manages the Government town of Oak Ridge—a function specifically committed to the Commission by the Act and which it could perform through its own employees. Carbide and Carbon Chemicals operates the Oak Ridge plants for production of fissionable materials—another duty expressly imposed on the Commission which is given a governmental monopoly of all such production. In the most substantial sense these contractors are *alter egos* of the Commission and perform some of its most important work under its direction and control. What they do is an integral part of the Commission's direct sphere of action.

It is difficult to believe that the Congress which specifically authorized and contemplated this use of operating contractors, and at the same time "expressly" exempted all of the Commission's "activities" from "taxation in any manner or form", could have intended to limit the exemption to those functions which the Commission should choose to carry on directly, without contractor assistance. Congress must have been interested in the practical operation and effect of local taxation on the Commission's work, and not in the legal problem of the technical incidence of the tax on the contractor or on the Commission; and Congress contemplated that under the Act the Commission could make large-scale use of oper-

ating contractors. For purposes of constitutional immunity, this Court has recently been unwilling to weigh economic burdens and has concerned itself with the problem of legal incidence, but Congress, as the Court has noted, has a different role. Congress can, and does, act with practical motivation and purpose and in the light of fiscal and economic considerations. We suggest that it must have done so here, and that it did not stop with merely restating existing constitutional immunities in the form in which petitioner thinks the Court has established them.

The broader meaning of "activities of the Commission"—to include functions performed through contractors—is also borne out by the use of that term in other portions of the Act:—the part of Section 9 (b) dealing with payments-in-lieu-of-taxes; Section 15, providing for a Joint Committee on Atomic Energy to study "the activities of the Atomic Energy Commission * * *"; and Section 17, requiring reports to Congress concerning "the activities of the Commission".

The fact that the contractor, rather than the Commission, may be the taxpayer is immaterial. The Act exempts from taxation not only the Commission itself but also its "activities"; to that extent the exemption is granted in terms of the subject matter freed from taxation and not of the taxpayer exempted. This is a common method of federal tax immunization, in which a private taxpayer is accorded an exemption because of certain

dealings or connections with the Federal Government. *E.g., Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 31; *Maricopa County* v. *Valley National Bank*, 318 U.S. 357.

D. The background and legislative history of the Atomic Energy Act confirm the conclusion reached on the face of the statute. Congress was well aware of the important wartime role of atomic energy contractors. From the Manhattan District's experience, it also knew that the bulk of the new Commission's expenditures would probably flow from the construction and operation of its plants and facilities. If contractors were employed for this purpose, the mass of expenditures would be for their reimbursement and payment; if the Commission were to perform these functions through its own employees, the expenditures would, of course, consist of direct payment for supplies, materials, and services. Perhaps the most significant factor in the legislative history of the tax exemption provision of Section 9 (b) is that at all stages of Congressional consideration of atomic energy legislation, the tax exemption clauses of the measures under review (the May-Johnson and McMahon bills) were designed to be broad enough to cover the mass of the Commission's expenditures for operation of its plants and facilities—whichever way these operations could be lawfully carried on.

Under the first-considered May-Johnson bills

(H.R. 4280, H.R. 4566), which permitted the employment of operating contractors, the wide exemption was secured by characterizing the contractors as the Commission's agents and thus exempting their purchase and use transactions through the tax exemption accorded the Commission itself. However, the original McMahon bill (S. 1717), which ultimately became the Atomic Energy Act, forbade the Commission from using contractors to operate its production plants. But a broad tax exemption, in the practical sense, was also assured under this measure because the Commission's own employees would perform most of its functions and the exemption clause plainly covered all taxes imposed on the Commission itself.

When the McMahon bill was revised to authorize the employment of operating contractors, the exemption clause of the bill (which had previously covered only the Commission itself and its income and property) was simultaneously expanded to cover "activities of the Commission"—a phrase which the legislative history shows was used throughout the consideration of the May-Johnson and McMahon bills as of sufficient scope to cover all of the Commission's functions, including those performed through contractors. By this means, there was established a tax exemption of the same practical breadth as in the May-Johnson bills and in the original version of S. 1717. The bulk of the Commission's functions, whether performed di-

rectly or through contractors, was freed from the burden of state and local taxation.

E. Since Section 9 (b) applies broadly to all "activities of the Commission", it is immaterial whether the Tennessee sales tax be formally denominated a tax on the vendor or on the vendee. The tax is mandatorily required, under criminal penalties, to be passed on to the purchaser, and the Commission's contractors are legally obligated to pay it. Whatever the legal incidence and the label, Section 9 (b) should apply in view of its broad purpose and wording.

In any event, the Tennessee statute does make the purchaser's status determinative, as the State Supreme Court has held in the case of a local entity exempt from taxation. And if the matter of legal incidence and obligation be deemed relevant to the application of Section 9 (b), this Court can decide those issues for itself. In practical effect and impact, the tax clearly has the characteristics of a vendee tax.

ARGUMENT

The Supreme Court of Tennessee rejected, on the authority of *Alabama* v. *King & Boozer*, 314 U.S. 1, the contention that the purchase and use of materials by the Atomic Energy Commission's cost-type contractors are constitutionally immune from the State's sales and use taxes. It held, however, that Section 9(b) of the Atomic Energy Act established a statutory exemption which is applic-

able to these taxes. There are persuasive arguments that the lower court erred in its resolution of the issue of constitutional immunity and that the decision below can be supported on constitutional grounds, apart from Section 9(b). But the respondents find it unnecessary to deal with that constitutional issue. Section 9(b) furnishes a statutory solution which the Supreme Court of Tennessee properly accepted. Whether or not the Constitution would bar the taxes involved in these cases if Congress had been silent, the express exemption declared by Congress in Section 9(b) does prohibit the imposition of Tennessee's sales and use taxes in the circumstances presented here.

Section 9(b) of the Atomic Energy Act of 1946 Prohibits State Taxation of Sales to, or Use of Materials by, the Atomic Energy Commission's Cost-Type Contractors

A. *Constitutionality of Such Tax Exemption Provisions.*

The controlling clause of Section 9(b) states:

> The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

This is a specific tax exemption provision included by Congress in an important statute dealing with federal functions of prime significance. The State

has not challenged the constitutional power of Congress to enact such a provision or to bar these taxes (R. in No. 186, at 17-18; R. in No. 187, at 16). No such attack could well be made for recent decisions of this Court leave no doubt that Congress possesses the power to create exemptions of this type even though the Constitution, by itself, would not provide immunity in the particular circumstances. The general power to establish exemptions reasonably related to the performance of federal functions was announced and applied in *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 32-33; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102-104; *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 361, and *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715-719. See also *Mayo* v. *United States*, 319 U.S. 441, 446-8; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606-7; *Smith* v. *Davis*, 323 U.S. 111, 116-119; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 365-6.[5]

And a decade ago, in *Alabama* v. *King & Boozer*, 314 U. S. 1, 8, and *Curry* v. *United States*, 314 U. S.

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[5] Earlier cases recognizing the same principle are: *Helvering* v. *Gerhardt*, 304 U. S. 405, 411-12 (fn.); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 161; *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 23; *Trotter* v. *Tennessee*, 290 U. S. 354; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, 129; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 578-9, 581; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 211-213; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 323; *Gondy* v. *Meath*, 203 U. S. 146, 149-150; *Central Pacific Rd. Co.* v. *California*, 162 U.S. 91, 121, 125; *Thomson* v. *Pacific Rd.*, 9 Wall. 579, 588-9, 592; *Bank* v. *Supervisors*, 7 Wall. 26, 30-1.

14, 18, the Court recognized the validity of a legislative exemption for Government cost-plus contractors in circumstances which petitioner and the lower courts both maintain are identical with those presented here. Substantially the same position was taken eighty years ago when Chief Justice Chase wrote that the Court did not doubt that

> * * * *Congress may,* in the exercise of powers incidental to the express powers mentioned by counsel, *make or authorize contracts with individuals or corporations for services to the government;* may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; *and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.* [*Thomson* v. *Pacific Rd.*, 9 Wall. 579, 588-9 (italics supplied).]

B. *Broad Construction of Federal Tax Exemption Clauses*

The sole issue, then, is one not of constitutional power but of Congressional purpose and intent in establishing the particular exemption. That inquiry, this Court has pointed out, must be pursued in the light not only of the exemption's special terms but also of the broad aim of all such exemptions to protect the functions and activities which

Congress has sought to immunize from state tax burdens. A hospitable reading is more in keeping with the general purpose and history of exemption clauses than a narrow and technical interpretation confining their scope as much as possible. See *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, 31; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 673, 675.

In the *Pittman* case, for instance, the Court construed a clause exempting Home Owners' Loan Corporation "loans" [6] as striking down a Maryland tax on mortgage-recording which was sought to be applied to HOLC mortgages. In order "to carry out the manifest purpose of the *broad exemption*" (italics supplied), the Court held that the exemption of "loans" covered the "entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security". 308 U.S., at 31.

Similarly, *Bismarck Lumber* held that the "unqualified term 'taxation' " and the "broad exemption accorded to 'every Federal land bank' " (314 U.S., at 99, 100) by Section 26 of the Federal Farm

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[6] "The Corporation, including its franchise, its capital, reserves and surplus, and its *loans* and income, shall likewise be exempt from such taxation * * *" (italics supplied). Home Owners' Loan Act of 1933, Section 4 (c), c. 64, 48 Stat. 128, 130, 12 U.S.C. 1463 (c).

Loan Act[7] invalidated state sales taxes on a Federal land bank's purchases. The statutory protection could not "be frittered away" by limiting the exemption to the subjects specifically listed by Congress. 314 U.S., at 99. Significantly, the Court took occasion to support its view that the exemption before it was to be given a "broad construction" by stating that the legislative history of similar exemption clauses in other statutes supported that interpretation. 314 U.S., at 100.[8]

In the same vein of generous interpretation, the recent *New Jersey Insurance Co.* case refused to concern itself with narrow niceties of tax nomenclature or "accounting labels" in invalidating,

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[7] "That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation * * *." Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, 380, 12 U.S.C. 931.

[8] In footnote 7, the Court referred specifically to the quick Congressional avoidance of the Court's decision in *Baltimore National Bank* v. *State Tax Commission*, 297 U.S. 209, by an amendment to the tax exemption clause of the Reconstruction Finance Corporation Act. The *Baltimore National Bank* case held that, notwithstanding the statutory exemption of the RFC from taxation, national bank shares held by it were subject to state and local taxation because R.S. 5219, 12 U.S.C. 548, provided that all shares of national banks could be taxed. Six weeks later, Congress passed the Act of March 20, 1936, c. 160, 49 Stat. 1185, 12 U.S.C. 51d, exempting the RFC from all such taxation, whether past or future. In *Bismarck*, the Court noted that the legislative history of the amendment showed that Congress was of the view that the original tax exemption had been intended to give as wide an immunity as possible to the "functions and activities" of the RFC.

under R.S. 3701,[9] a state tax assessing an insurance company's intangibles which did not provide a deduction on account of the federal bonds owned by the company. The inquiry was "whether in practical operation and effect the tax is in part a tax upon federal bonds", contrary to the statute. 338 U.S., at 673.

The tone and words of the tax exemption provision involved here—Section 9(b)—are in full harmony with these admonitions to give a "broad exemption" a "broad construction" which pays close attention to "practical operation and effect" and does not "fritter away" the protection Congress thought it granted. As a whole, the exemption in Section 9(b) is certainly "broad" and "unqualified" in its terms; it specifically covers not only the Commission itself, its "income" and "property", but also its "activities"; and it uses the significantly strong and inclusive words:—"are hereby *expressly* exempted from taxation *in any manner or form*". On the face of the provision, it is evident that Congress meant to accord wide freedom from state and local tax burdens, and this should be the major premise in answering the specific question of interpretation posed here.

[9] "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." R.S. 3701, 31 U.S.C. 742.

C. *The Terms of Section 9(b)*

1. *"Activities of the Commission" include the purchases and use involved here.*

(a). The State Supreme Court held, and it is our position, that the "express" exemption of the "activities of the Commission" from taxation "in any manner or form" covers the payment of sales and use taxes by these cost-type contractors who perform, on the Commission's behalf, most important functions which admittedly the Commission is charged by the Atomic Energy Act with having performed and which it could perform, if it chose, through employees directly paid and controlled by itself. Roane-Anderson Company manages the famous Government-owned town of Oak Ridge (*supra*, pp. 7-10)—a function committed to the Commission by Section 12(a)(5) of the Act (*infra*, pp. 64-65). Carbide and Carbon Chemicals Corporation operates the Oak Ridge plants for production of fissionable materials (*supra*, pp. 10-12)—a function of evident significance which is specifically made a Government monopoly and imposed on the Commission by Section 4 (c)(1) and (2) (*infra*, pp. 61-63). In each case, the contractor is under the constant supervision and control of the Commission; in particular, all of the contractor's purchases and transactions above a nominal sum had to be approved by the Commission; and the Commission bears all the costs and expenses of the operation, including the sales and use taxes

levied by the State. In both cases, the contractors are in the most substantial sense *alter egos* of the Commission and perform some of its most important work under its direction and control. *Supra*, pp. 7-12; Memorandum on behalf of the contractor respondents.

There is obviously no linguistic difficulty in calling these functions integral parts of the Commission's "activities"—its direct sphere of action—regardless of whether they be carried on by its own employees or by contractors acting on its behalf and at its behest. In our day, the word "activities" has the widest of ranges,[10] and can easily carry the general connotation of "affairs" or "sphere of action" or "functions". There need be no stretching of English to apply the term here.

(b). That "activities" should be given this wider meaning in Section 9(b) is suggested not only by the canon of liberal interpretation discussed above (*supra*, pp. 21-24) and by the emphatic character Congress has given to the tax exemption clause (*supra*, pp. 19, 24), but also by other strong internal evidences in the Atomic Energy Act.[11]

Of greatest importance is the authorization Congress gave the Commission to make use of contractors in the operation of its plants and the

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[10] Compare "social activities", "business activities", "recreational activities", "combatant activities", "public activities", "governmental activities", etc.

[11] We leave the significant legislative history and background for separate treatment. *Infra*, pp. 38-53.

carrying-on of its functions. Section 4 (c)(2) (*infra*, pp. 61-63) first directs the Commission "to produce *or to provide for the production* of fissionable material in its own facilities" (italics supplied), and then empowers the Commission "to the extent deemed necessary * * * to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission".[12] Section 9(a) provides for the transfer to the Commission of Manhattan Engineer District "contracts", and both the Roane-Anderson and the Carbide and Carbon Chemicals contracts were so transferred by Executive Order No. 9816, December 31, 1946, 12 F.R. 37. *Supra*, pp. 8, 10.

It is difficult to believe that the Congress which thus authorized and contemplated the use of operating contractors in the performance of the Commission's gravest duties, and at the same time "expressly" exempted all the "activities" of the Commission from nonfederal "taxation in any manner or form", could have intended to limit the exemp-

[12] Section 4 (c)(2) also provides:

"Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission."

tion to those functions which the Commission should choose to carry on directly, without the assistance of operating contractors. In using these words and in establishing the exemption, Congress was interested in the practical operation and effect of local taxation on the Commission's far-flung and continuing functions, such as the production of fissionable material at its plants, and the providing of facilities and services for the housing, health, and welfare of its employees at places like Oak Ridge and Hanford. One of the essential requirements in the maintenance and operation of these facilities, plants, and services is the procurement and use of supplies, and the taxes on the purchase and use transactions involved here are an immediate drain on the Commission's funds and a clear burden on the carrying out of its assigned program. The practical effect is precisely the same as if the Commission had dispensed with all operating contractors, and the State had imposed these taxes directly on use and purchase by the Commission.[13] These are the matters in which a legislature declaring a broad tax exemption—and aware that the Commission's future operation, as in the past, might well be carried on through cost-plus contractors—would primarily be interested;

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[13] In Appendix B we have set out a letter from the Atomic Energy Commission giving some statistics as to the probable impact of state taxes on the Commission's functions, if the petitioner's views are accepted. *Infra*, pp. 69-71.

it would surely be much less concerned with the legal problem of the technical incidence of the tax.

This seems to us the pertinent distinction between the role of the Court and of Congress in declaring an exemption. Congress is not in the position of the Court which, finding itself unable and unwilling to make constitutional immunity turn on a weighing of the economic or practical burden of the tax (often, though not always, a speculative process for a court), has inclined toward the relatively simple legal principle that such immunity exists only where the legal incidence of the tax is on the Government or its agencies—leaving to Congress the task of measuring and counteracting the economic incidence, interference, and burdens.[14] Congress has now acted in the atomic energy field, and it would be most inappropriate to overlook its prime concern with fiscal and economic considerations and to equate its practical motivation and purpose with the far different ends of the Court in constitutional-immunity cases.

To read Section 9 (b) in petitioner's way is to commit just that error. The tax exemption clause becomes identical with the Commission's constitu-

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[14] *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9; *Curry* v. *United States*, 314 U.S. 14, 18; *Mayo* v. *United States*, 319 U.S. 441, 447; cf. *Helvering* v. *Gerhardt*, 304 U.S. 405, 419-420, 421-422; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 484-485, 487; *United States* v. *Allegheny County*, 322 U.S. 174, 190.

tional immunity, as the court below pointed out (R. in No. 186, at 22; R. in No. 187, at 21), and represents nothing more than a useless or unnecessarily cautious restatement of existing constitutional law.[15] Congress may possibly have been doing only that when it enacted Section 9 (b), but in view of all the circumstances we have outlined thus far (*supra*, pp. 21 *et seq.*), we believe that the probabilities are strongly otherwise.

(c). Certain other evidences, within the four corners of the Atomic Energy Act, of the wider meaning of "activities * * * of the Commission" remain to be mentioned. The first three sentences of Section (b) authorize the Commission, under stated conditions and circumstances, to make payments to state and local governments in lieu of property taxes, "in order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation". *Supra*, pp. 2-3. It is to be noted, first, that there is an express withholding of submission to state and local real estate or property taxation. This is

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[15] Petitioner refers to several other tax exemption clauses as indicating that Congress is in the habit of simply spelling out the constitutional immunity (Pet. in No. 186, at 32; Pet. in No. 187, at 32-33). The examples cited are all of *corporations* which Congress could, quite realistically, fear might be held subject to state taxation because of their corporate form and type of activity.

unusual,[16] and in itself indicates a purpose to grant a wide tax exemption.

Secondly, it seems significant that in the opening sentence of Section 9 (b) Congress speaks of rendering financial assistance to states and localities "in which the *activities of the Commission* are carried on". It is apparent that here the term "activities of the Commission" must include the functions performed by operating contractors, both because the Act contemplated that the Commission's most important work could be carried on, in the future, through such contractors, and also, and more importantly, because Congress was obviously thinking mainly of activities at Oak

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[16] Section 5219, Revised Statutes of the United States (12 U.S.C. 548), which stems from the Act of June 3, 1864, c. 106, 13 Stat. 99, 111, Sec. 41, authorizing the creation of national banking associations, submits the real property of national banks to state taxation. Other statutes submitting federally-owned real property to state and local taxation, including Section 10 of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47, Stat. 5, 9, as amended by Section 3 of the Act of June 10, 1941, c. 190, 55 Stat. 248 (15 U.S.C. 610), were presumably based upon paragraph 3 in R.S. 5219. Among such statutes are the Federal Farm Loan Act, c. 245, 39 Stat. 360, 380, Sec. 26 (12 U.S.C. 931, 933) (1916); Agricultural Credits Act of 1923, c. 252, 42 Stat. 1454, 1469, Sec. 211 (12 U.S.C. 1261); Federal Home Loan Bank Act, c. 522, 47 Stat. 725, 735, Sec. 18 (12 U.S.C. 1433) (1932); Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, 130, Sec. 4(c) (12 U.S.C. 1463(c)); Banking Act of 1933, c. 89, 48 Stat. 162, 177, Sec. 8 (12 U.S.C. 264(p)); Federal Farm Mortgage Corporation Act, c. 7, 48 Stat. 344, 347, Sec. 12 (12 U.S.C. 1020f) (1934); National Housing Act, c. 847, 48 Stat. 1246, 1252, 1255, 1257, Secs. 208, 307, 402, (12 U.S.C. 1714, 1722, 1725e) (1934); Act of March 8, 1938, c. 44, 52 Stat. 107, 108, Sec. 5 (15 U.S.C. 713a-5); Act of March 28, 1941, c. 31, 55 Stat. 55, 61, Sec. 1 (12 U.S.C. 1741).

Ridge (in Tennessee), Hanford (in Washington), and Los Alamos (in New Mexico), all of which had been previously acquired by the Manhattan District and at which the chief functions had been performed during World War II by contractors. If "activities of the Commission", as used in the first sentence of Section 9 (b), is restricted to those functions performed by the Commission's own employees, little would be left to the Congressional direction regarding payments in lieu of taxes.

The state chancery court sought to avoid reading "activities" in the same broad sense throughout Section 9 (b) by singling out the use of the word "agents" in the second sentence which directs the Commission, in making "in lieu" payments, to take account of special burdens cast upon the States or locality "by activities of the Commission, the Manhattan Engineer District *or their agents*". *Supra*, pp. 2-3. The special chancellor inferred from the absence of "agents" in the subsequent tax exemption clause that only activities carried on by the Commission directly, through its own employees, were exempted (R. in No. 186, at 56-57; R. in No. 187, at 53-54). This textual finesse might possibly have pleased a nineteenth century expert at common-law pleading, like Baron Parke, but it is hard to give it more than artistic credit in these days of less mechanical interpretation.

Even on its own formal level, the chancellor's reading cannot be accepted. It assumes that the Commission's "activities" are rigidly separate and apart from the "activities" of its "agents" (*i.e.*, contractors), so far as Section 9 (b) is concerned. But as we have pointed out (*supra*, pp. 31-32), the opening sentence, which refers only to "the activities of the Commission" and does not mention "agents", makes little real sense if this separation is read into it. Moreover, the whole matter of "in lieu" payments would become internally inconsistent and unworkable. For the first sentence would permit "in lieu" payments to be made only to those areas in which "the activities of the Commission" (in the narrow sense) were carried on, but the second and third sentences would require the Commission to consider, in determining the amount of the payment, the burdens and benefits not only of the "activities of the Commission" (in the narrow sense) but also of the "agents'" separate and independent "activities".

It seems more in accord with the text and with reality to assume that Congress retained the word "agents" in the second sentence of Section 9 (b) because someone wanted to make absolutely certain that the activities of the operating contractors were not omitted in determining, for the purpose of "in lieu" awards, the burdens and the benefits of the

Commission's activities.[17] Throughout Section 9. (b), the term "activities of the Commission" has the same broad coverage; the fact that it is spelled out more in detail in the second sentence does not narrow its meaning in the first and fourth sentences.

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[17] This conclusion is supported, we believe, by the Act's legislative history. As we point out below (in the section on background and legislative history), the payment-in-lieu-of taxes and tax exemption provisions of S. 1717 (the bill which became the Atomic Energy Act), as it was originally introduced, were taken bodily from the rival May-Johnson bills (H.R. 4280, H.R. 4566) (see *infra*, pp. 45-46, 47). The "in lieu" provision of the May-Johnson bills contained the reference to the burdens and benefits attributable to the "activities of the Commission", of the Manhattan Engineer District, "or their agents", which is now found in Section 9 (b)—but it also contained a general provision expressly defining and characterizing the Commission's contractors as its "agents". See *infra*, p. 46. We show below that in the May-Johnson bills the term "activities of the Commission" plainly had a very broad meaning, including functions performed through contractors. *Infra*, pp. 42-45. It is highly probable, therefore, that the reference to "agents" was added out of unnecessary caution, or perhaps because of the express statutory characterization of contractors as agents so as to make sure that the contractors' activities were considered in fixing the amount of "in lieu" awards.

S. 1717 borrowed these "in lieu" clauses from the May-Johnson bills, but it did not take over the general definition of "agents" which had been included in the other measures. This borrowed reference, in the "in lieu" clauses, to the burdens and benefits attributable to "agents", remained throughout the revisions of S. 1717. It appears to have been a residue of the May-Johnson bills which was retained through caution, inertia, or inadvertence, and has no greater significance.

It is clear that the May-Johnson bills viewed operating contractors as "agents" of the Commission, regardless of whether they were independent contractors or agents in the conventional sense. As noted above, there was an express provision to that effect, and the Committee Report speaks of such contractors as "agents". See H. Rep. No. 1186, 79th Cong., 1st Sess., p. 11, quoted *infra*, pp. 44-45.

The broader reading we advocate is also borne out by Section 17 of the Act,[18] dealing with the Commission's semi-annual reports to Congress. These reports, the statute says, are to concern "the activities of the Commission"—the same phrase used in Section 9 (b). Here, too, it is obvious that the phrase cannot possibly have the narrow meaning ascribed by petitioner, since the Act authorized and contemplated the carrying on of the Commission's major functions through contractors. *Supra,* pp. 25-26. For the same reason, the term "activities of the Atomic Energy Commission" in Section 15, concerning the Joint Committee on Atomic Energy, must likewise have the wider scope.[19]

In short, in each of the three sections of the Act in which the term "activities of the Commission" is used (Sections 9, 15, 17), the broader meaning covering the functions performed by cost-type contractors seems both appropriate and required.

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[18] Section 17 provides:

> The Commission shall submit to the Congress, in January and July of each year, a report concerning the *activities of the Commission.* The Commission shall include in such reports and shall at such other times as it deems desirable submit to the Congress, such recommendations for additional legislation as the Commission deems necessary or desirable. (Italics supplied.)

[19] Section 15 establishes a Joint House and Senate Committee on Atomic Energy and provides, in part:

> The joint committee shall make continuing studies *of the activities of the Atomic Energy Commission* and of problems relating to the development, use and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. * * * (Italics supplied).

2. *It is immaterial that the contractor may be the taxpayer.*

No difficulty is raised by the assumption—which we make here for the purposes of our argument—that the tax is imposed on, and paid by, the contractor, rather than the Commission. Section 9 (b) excepts the Commission itself from "taxation in any manner or form", but it does not stop there. It also broadly excepts the "activities * * * of the Commission" from "taxation in any manner or form", and nowhere does it state or imply that the only "activities" immunized are those as to which the Commission is the taxpayer. In this part of the exemption clause, the phrasing is in terms of the subject matter freed from taxation rather than of the taxpayer exempted.

It is quite common for federal tax exemption provisions to deal in this fashion with a subject matter to be exempted, and thus to grant immunity to taxpayers who may be private persons and not federal agencies or instrumentalities. In *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 31, the Court indicated that the Maryland recording tax would also be invalid where a non-governmental person sought to record an HOLC mortgage. It repeated what it had said in an earlier case: "whoever pays it it is a tax upon the mortgage and this is what is forbidden by the law of the United States." So here, even though the tax is initially

paid by the contractor, it is a tax upon the "activities" of the Atomic Energy Commission and that is what is forbidden by Section 9 (b).

A comparable recent case is *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, in which an Arizona tax on a national bank's preferred stock owned by the Reconstruction Finance Corporation was invalidated as contrary to the federal act exempting such shares from state taxation. Suit was brought by the bank which, under the Arizona law, was the taxpayer, though, like respondent contractors here, it was statutorily entitled to reimbursement from the shareholder (*i.e.*, the R.F.C.) on whom the tax liability ultimately rested (318 U. S. at 359).

Numerous other decisions have applied or recognized the applicability of federal tax exemption statutes to taxes paid by private taxpayers and not by the Government or its agencies. See *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665; *Board of County Commissioners* v. *Seber*, 318 U.S. 705; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 606-607; *Lawrence* v. *Shaw*, 300 U.S. 245; *United States* v. *Allegheny County*, 322 U.S. 174, 187-189; and the cases cited in footnote 5, *supra*, p. 20. In each of these cases, the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested

in profit on its own account" (*Clallam County* v. *United States*, 263 U.S. 341, 345).[20]

D. *Background and legislative history*

We have attempted to show that, quite apart from the aid of the Atomic Energy Act's background and history, there is very good reason for construing the tax exemption clause of Section 9 (b) as applicable here. The statutory background and history seem to us to snap the lock securely.

For it is quite clear that (a) Congress was well aware of the important wartime role of atomic energy contractors, and it also knew that, if the Commission continued to use contractors as constructors or operators of its plants and facilities, the bulk of its expenditures would be for their reimbursement and payment; (b) throughout the Con-

[20] The *use* tax, which is involved in the two separate suits brought by Roane-Anderson and Carbide and Carbon Chemicals (*supra*, pp. 4, 5), also falls for the independent reason that it is imposed on "property * * * of the Commission" which Section 9 (b) exempts from taxation along with the Commission's "activities". Materials and supplies bought by the Commission's operating contractors for use in the performance of their contracts belong to the Commission under the title provisions of the contracts. *Supra*, pp. 9-10, 12. Accordingly, they cannot be taxed directly and their "use" is likewise exempt from taxation since in practical operation and effect a tax on the use of property is equivalent to a tax on the property. Cf. *United States* v. *Allegheny County*, 322 U.S. 174, 177, 184-185, 186, 187-188. As we point out in the text of this section (*supra*, pp. 36-38), it is immaterial that the taxpayer may be the contractor, which does not own the property. It is the subject matter—"property of the Commission"—which is exempted.

gressional consideration of atomic energy legislation, the tax exemption clauses of the measures under review (the May-Johnson and McMahon bills) were designed to be broad enough to cover the mass of the Commission's expenditures for operation of its plants and facilities; and (c) when the McMahon bill, after first prohibiting the use of contractors as operators of the Commission's plants and requiring the Commission to operate them itself, was revised to permit the employment of contractors, the tax exemption clause of the bill (which had previously covered only the Commission itself and its income and property) was simultaneously expanded to cover "activities of the Commission", a term which had been generally used throughout the Congressional consideration as sufficiently broad to cover all of the Commission's functions, including those performed through contractors.

1. *The wartime role of atomic energy operating contractors*

Use of the services of operating contractors at the major atomic energy installations had been the practice of the Manhattan Engineer District during World War II. At Oak Ridge, the Carbide and Carbon Chemicals Corporation, Roane-Anderson Company, and Monsanto contracts were originally executed by the Manhattan District. At Hanford, in the State of Washington, the duPont

Company had served as operating contractor during the war, and in September 1946, was succeeded by General Electric Company. At Los Alamos, in New Mexico, the University of California had been the operating contractor for the weapons work from the very start of activities at that remote site. Similarly, the University of Chicago had been the operating contractor for the atomic energy activities centered in the Chicago area. Cf. R. in No. 186, at 9, 20-21; R. in No. 187, at 8, 19.

At Oak Ridge, respondent Carbide and Carbon Chemicals Corporation has operated the gaseous-diffusion production facilities since they were constructed. Respondent Roane-Anderson Company was formed for the purpose of managing and operating the town of Oak Ridge for the Manhattan District. *Supra*, pp. 7-12.

All these circumstances were well known to Congress when it had under consideration, in 1945 and 1946, the various proposals for atomic energy legislation. The Smyth Report, which was issued in August 1945, recounted the major role of university and industrial contractors in the development of atomic energy and the production of the atomic bomb under the Manhattan District. At the first hearings on atomic energy legislation, in October 1945, before the House Committee on Military Affairs, Secretary of War Patterson stressed the need for continuing the "well-integrated and

irreplaceable organization of scientists, executives, engineers, and skilled workers". Hearings before the Committee on Military Affairs, H. of Reps., on H. R. 4280, 79th Cong., 1st Sess., p. 7 (October 9, 1945). At the same hearing, General Groves, who had headed the Manhattan District, pointed out (p. 9): "The success of the Manhattan District Project would have been impossible without the support it received from colleges and universities, from large and small industrial corporations, and from the skill of American labor"; and "Our progress in the future atomic development will depend equally on the utilization of the fullest support that can be drawn from all of these sources".

At the more extensive Senate hearings beginning late in November 1945, testimony was prominently given by representatives of the operating contractors of the Manhattan District. Scientists from the several universities which had contributed to the project testified at length. Representatives of the General Electric Company, the Stone and Webster Engineering Company, the Union Carbide and Carbon Corporation, and the Carbide and Carbon Chemicals Corporation, also expounded the functions they had performed and the important role which the operating contractors had played in the wartime atomic energy program.[21]

[21] Hearings before the Senate Special Committee on Atomic Energy, 79th Cong., 1st Sess., pursuant to S. Res. 179, Part 1,

2. *The May-Johnson bills.* The first measure to receive active consideration was the so-called May-Johnson bill, originally drafted under the supervision of an Interim Committee on Atomic Energy, appointed by Secretary of War Stimson with the approval of the President (Hearings before the House Committee on Military Affairs, *supra*, pp. 4-5; Hearings before the Senate Special Committee on S. 1717, *supra*, p. 390; H. Rep. No. 1186, 79th Cong., 1st Sess., p. 1).

H.R. 4280. The bill, which was introduced as H.R. 4280, proposed an Atomic Energy Commission and an Administrator with large powers. Of present significance are these three general aspects of the measure:

(a) the terms "activities" and "activities of the Commission" were used frequently and broadly, to cover all the Commission's functions, no matter by whom performed (Section 3(a), Section 10(a), (b), (c), Section 13, Section 14, Section 16);[22]

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pp. 79-143, Part 3, pp. 407-447; Hearings before the Senate Special Committee on Atomic Energy, 79th Cong., 2d Sess., on S. 1717, Part 2, pp. 101-134, Part 3, pp. 281-296, 359-378.

[22] *E.g.*, Section 3 (a) stated: "*In the conduct of its activities,* the Commission shall adopt the policy of minimum interference with private research and of employing other Government agencies, educational and research institutions, and *private enterprise* to the maximum extent consistent with the accomplishment of the objectives of this Act. The *activities of the Commission* shall be carried on in accordance with the basic principles established by the President in the promotion of international peace, the development of foreign policy, and the safeguarding of the national defense." Section 10(a) gave general authority to the Administrator, under the Commission's supervision, to carry out the performance of the

(b) the Commission and the Administrator were expressly authorized to use contractors in the performance of their respective functions (Section 3(a), Section 5(a)(1)(2), Section 10(a); see footnote 22, *supra*, p. 42);

(c) the Commission was granted the power to create corporations to carry out its functions (Section 5(a)(7)).

H. R. 4566: After public hearings (*supra*, pp. 40-41, 42) and executive consideration, the House Committee on Military Affairs requested its chairman to introduce a bill embodying the provisions of the original bill (H.R. 4280) as amended by the Committee. See H. Rep. No. 1186, 79th Cong., 1st Sess., p. 3. This revised version of the May-Johnson bill was H.R. 4566, which was reported to the House on November 5, 1945, in H. Rep. No. 1186, *supra*.

With respect to the three facets of H.R. 4280 discussed above (*supra*, pp. 42-43), H.R. 4566 followed the earlier version, except that the new bill made it even clearer that "activities of the Commission" included those functions performed through contractors, and that contractors might be used to perform Commission functions.

As before, the terms "activities" and "activities of the Commission" were used extensively in the

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Commission's program, and authorized him, with the Commission's approval, to "arrange, by contract or otherwise, with other persons *to engage in any of the foregoing activities* on behalf of the Commission, and subject to its supervision." (Italics supplied).

broad sense (Section 3(a); Section 10(a), (b); Section 13; Section 14, Section 15). Section 10(a), which is significantly headed "*Activities of Commission*" (italics added), contains the major grant of power to the Commission and the main description of its functions: *i.e.*, "research and experimentation" and the "development of any and all processes or methods for the release of atomic energy, and for the exploitation and use thereof for military, industrial, scientific, or medical purposes". As in H.R. 4280, the Commission is given express authority to "arrange by contract or otherwise with other persons to engage in any of the foregoing *activities* on behalf of the Commission, and subject to its supervision" (italics supplied).

The House Committee's report made the following revealing comment on these provisions of Section 10(a), a comment which plainly shows that in the May-Johnson bills "activities of the Commission" included those functions performed through contractors (H. Rep. No. 1186, *supra*, pp. 11-12):

> SECTION 10. ACTIVITIES OF COMMISSION
>
> *This section deals with the carrying on of the Commission's activities, either through its own employees or through operating agents or contractors.*
>
> Under subsection (a), the Commission and the Administrator (upon delegation from the Commission) are authorized to conduct research in the field of atomic energy, to develop

processes for the release of such energy and for its use for military, industrial, scientific, and medical purposes, and to engage in necessary related activities. *They may perform these functions through employees, or through contractors or other agents.* The last-mentioned provision permits the Commission to continue, if it desires, the Manhattan engineer district's practice of using the services of management corporations for the operation on its behalf of Government plants in Tennessee, Washington, and elsewhere. For research, the policy shall be to utilize and encourage educational, research, and nonprofit institutions properly equipped and staffed.

Subsection (b) provides that no other Government agency shall *engage in such activities* without the consent of the Commission or the Administrator and subject to the conditions imposed by the Commission, except that the armed forces may do so in time of war or national emergency if so directed by the President. [Italics supplied.]

The tax exemption clause in H.R. 4280 (Section 16) and H.R. 4566 (Section 15), which was the same in both, fitted in with this treatment of the contractor's work as an integral part of the Commission's activties:

> The Commission and any corporation created by it, and the property and income of the Commission or of such corporations, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

Though this clause did not refer to "activities of the Commission"—as does Section 9(b) of the final Act—it is clear that it was intended to cover functions performed by contractors under Section 10(a), because both bills expressly characterized "contractors with the Commission" as its agents, along with "corporations created by the Commission" "and other agents" (Section 20(g) of H.R. 4280; Section 19(g) of H.R. 4566). By this device, the express exemption of the Commission itself operated to exempt the contractor-agent.[23]

3. *The McMahon bill.* H. R. 4566, the revised May-Johnson bill, was never acted upon by the House of Representatives. The Senate Special Committee on Atomic Energy, which had been created in November 1945, to consider the general problem of the atomic bomb and of atomic energy legislation, focussed its attention on another measure, S. 1717, known as the McMahon bill, which was introduced by the Senator from Connecticut on December 20, 1945. This was the bill which became the Atomic Energy Act of 1946, after extensive revisions.

(a). As originally introduced, S. 1717 differed from the May-Johnson bills on the first two of the three aspects discussed above, (*supra*, pp. 42-43) (*i.e.*, Commission "activities", use of contractors,

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[23] Both bills also contained a provision for payment-in-lieu-of-taxes which is almost identical with that now contained in Section 9 (b) of the Act (H.R. 4280, Section 16; H.R. 4566, Section 15).

creation of Commission corporations).[24] The Senate measure was framed in different terms, and did not make use of the phrase "activities of the Commission", except in the section (Section 8(b)) dealing with payments-in-lieu-of-taxes and tax exemption which was identical with that in the May bills (see footnote 23, and *supra*, pp. 45-46), and in the section on reports to Congress (Section 13) which also appears to have been modelled on a similar report provision in the May bills.

But of larger importance for the present inquiry is the provision of the original McMahon bill requiring the Commission to produce its fissionable materials in its own plants by its own employees. It was expressly directed to terminate, "as rapidly as practicable, and in any event not more than one year after the effective date of this Act", all contracts previously made for the production of fissionable materials (Section 4(b), (e)). Moreover, there was no specific provision anywhere in the bill for the use of cost type contractors in the performance of any other of the Commission's function, except research and development activities. This, of course, was radically different from the May-Johnson bills which were premised on the assumption that the new Commission could elect to continue the Manhattan District's practice of employing contractors to operate its plants and to perform other of its important functions.

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[24] S. 1717, as originally introduced, is reprinted in the Hearings before the Senate Special Committee on Atomic Energy on S. 1717, *supra*, pp. 1-9.

As noted above, the payments-in-lieu-of-taxes and the tax exemption provisions of the original S. 1717 (Section 8(b)) were identical with those in the May-Johnson bills, including the reference to Commission-created corporations. See Hearings before the Senate Special Committee on Atomic Energy on S. 1717, *supra*, at p. 5. Since the Commission could not employ operating contractors for its plants and its functions were mainly to be performed directly or through its own corporations, the question of whether a cost-plus contractor's purchase transactions were tax exempt under this provision was obviously of minor importance.[25] Exemption of the Commission and its corporations was sufficient.

(b). The War Department report on S. 1717 strongly urged the elimination of the provision requiring the Commission to operate its plants through its own employees and prohibiting the use of contractors. It was pointed out that the experience of the Manhattan District had been that the services of skilled industrial and operating concerns might be essential to efficient production.[26] Others made similar suggestions publicly and, undoubtedly, also privately. See Hearings before the Senate Special Committee on Atomic Energy on

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[25] S. 1717 omitted the statutory characterization of contractors as "agents" of the Commission which had appeared in the May-Johnson bills. See *supra*, p. 46.

[26] This report is referred in Hearings before the Senate Special Committee on Atomic Energy on S. 1717, *supra*, at pp. 408, 409.

S. 1717, *supra*, at 298, 304; Sen. Rep. No. 1211 (on 1717), 79th Cong., 2d Sess., p. 7.

During the course of the Senate Special Committee's consideration of S. 1717, this suggestion was accepted and the prohibition on the employment of contractors was abandoned. Confidential Committee Print No. 4, dated March 27, 1946, removed the prohibition and expressly authorized the use of contractors. In terms substantially identical with Section 4(c)(2) of the Act (*infra*, pp. 61-62), Section 4(c)(2) of Committee Print No. 4 provided:

> The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect *with or without modification*,[27] contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts.

In explaining this provision of the bill, the Sen-

[27] The italicized words are omitted from Section 4(c)(2) as enacted.

ate Report on S. 1717 said (S. Rep. No. 1211, 79th Cong., 2d Sess., p. 15):

> Wherever possible the Committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. *Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry.* [Italics supplied.]

(c). At the same time that it made this major change in the powers of the Commission and the manner in which its activities were to be carried on, the Senate Committee (as revealed by its Committee Print No. 4) made another significant change: revision of the tax exemption clause of Section 9(b) of the bill to insert "activities of the Commission" and to omit the reference to the Commission's corporations[28]—making the clause read precisely as it now does.

In our view, the word "activities" was inserted in the tax exemption clause of Section 9(b) to make sure that that provision accorded fully with the newly accepted authorization to the Commission to employ contractors. From the experience of the Manhattan District, the Senate knew that if the Commission continued the practice of using oper-

[28] The elimination of the power to create corporations had been suggested by Harold Smith, then Director of the Bureau of the Budget (see Hearings before the Senate Special Committee on Atomic Energy on S. 1717, at p. 38), and this had been accomplished a week or so earlier in the previous version of the bill.

ating contractors the bulk of the Commission's expenditures would undoubtedly consist of reimbursement of, and payment to, these contractors. See *supra*, pp. 39-41. To have any real effect on the Commission's fiscal affairs, the exemption would have to be available to these contractors and cover the transactions which occurred in the performance of their contracts. Hence, the need to make sure that the clause was broad enough to cover the new authorization.

We suggest that the Senate Committee used the words "activities * * * of the Commission" for this very purpose because that term, as we have shown (*supra*, pp. 42-45), had been clearly used in the broad sense in the May-Johnson bills and, particularly, because it had the same wide scope in the payments-in-lieu-of-taxes provision which immediately preceded the tax exemption clause in Section 9 (b) and which had likewise been taken over from the May-Johnson bills. *Supra*, pp. 47, 48. Indeed, the same term "activities of the Commission" had previously been used in the broad sense by the Senate Committee itself, in providing for a Joint Committee on Atomic Energy (first appearing in Confidential Committee Print No. 2, dated March 9, 1946, Section 14)—the provision which became Section 15 of the Act (*supra*, p. 35).[29]

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[29] We have already noted that the term had the same broad meaning in the Reports section of the original S. 1717 (Section 13), which ultimately became Section 17 of the Act. *Supra*, pp. 35, 47.

We have shown above (*supra*, pp. 25-38) that on the face of the statute the term "activities of the Commission" should be given the meaning the Supreme Court of Tennessee attributed to it. We submit that the legislative history we have been detailing affirmatively proves that this is just what Congress desired and intended. Exemption of "activities of the Commission" was added to the tax exemption clause of Section 9(b) in order to cover those Commission functions performed through contractors.

4. *Summary.* At all stages of the Congressional consideration of atomic energy legislation, the tax exemption provision was sufficiently broad to exempt the great bulk of the Commission's operation from state sales and use taxes. From the history of the Manhattan District, Congress was aware that the mass of the Commission's expenditures would probably flow from the construction and operation of its plants and facilities. Under the May-Johnson bills (H.R. 4280, H.R. 4566), which permitted the employment of operating contractors, the wide exemption was secured by characterizing the contractors as the Commission's agents and thus exempting their purchase and use transactions through the tax exemption accorded the Commission itself. *Supra*, pp. 45-46. Under the original McMahon bill (S. 1717), which prohibited the Commission from using contractors to operate its production plants, a broad exemption,

in the practical sense, was also certain because the Commission's own employees would perform most of its functions and the tax exemption clause plainly covered all taxes imposed on the Commission itself. *Supra,* p. 48. And under the revised S. 1717, which became the Atomic Energy Act and authorized the employment of contractors, a tax exemption of the same wide scope was obtained by barring not only taxes levied directly on the Commission itself but also taxes imposed on the "activities of the Commission"—a phrase which the history of the legislation shows was used throughout the consideration of the May-Johnson and McMahon bills as of sufficient scope to cover all of the Commission's functions, including those performed through contractors or agents. *Supra,* pp. 42-45, 46-47, 50-51.

E. *The Nature of the Tennessee Tax*

1. Petitioner appears to contend that the Tennessee sales tax is a tax on the vendor, not the vendee, and for that reason Section 9 (b) cannot apply here even though it might exempt the contractor-purchaser from a similar sales tax if it were described as laid upon the vendee. Pet. in No. 186, at 40-42; Pet. in No. 187, at 38-41. But if, as we have urged, the exemption clause of Section 9 (b) is broad enough to cover sales taxes paid initially by the contractor and ultimately by the Commission, then it should make no difference

whether the State tax be formally denominated a vendor or a vendee tax.[30] The Tennessee statute expressly requires that the vendor must collect the tax from the purchaser at the time of making the sale and must add the tax to the price of the article. The tax is a debt from purchaser to seller until paid. Chap. 3, Public Acts 1947, section 4 and section 5 (a), (b) (*infra*, p. 67). Failure to collect the tax from the purchaser is made a misdemeanor (Section 5 (d), *infra*, p. 68). It is unlawful for a vendor "to advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax", and a violation of this provision is a misdemeanor (Section 5 (e), *infra*, p. 68).

In these circumstances, where it is evident that under the state law the sales tax must be paid by the Commission's contractor, the exemption accorded by Section 9 (b) cannot vary with the technical incidence of the tax on the contractor-

[30] The distinction between vendor and vendee taxes obviously plays no part in connection with the *use* tax which is admittedly imposed on the users, which are the Commission contractors Roane-Anderson and Carbide and Carbon Chemicals. *Supra*, pp. 4, 5. However, a similar formal distinction between a tax on the property and one on the "use" of the property may be thought to be present. For the same reasons as those given in the text with respect to vendor and vendee sales taxes, we believe that the formal difference between a tax on "use" and one on the property itself is immaterial in applying the prohibition in Section 9 (b) against taxation of the "property of the Commission". See fn. 20, *supra*, p. 38.

vendee or the merchant-vendor. As we have shown (*supra*, pp. 21-53), that exemption was neither conceived nor couched in terms of formal legal incidence, and it would subvert both its sweeping aim and its broad wording to make it depend on a distinction in label which is economically nonexistent. See *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 673, 674, 675, discussed *supra*, pp. 23-24; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 84.[31]

2. In any event, the Tennessee statute imposes a legal obligation on the purchaser to pay the tax, and therefore must be called a vendee tax. The tax provisions sketched above show that the Tennessee legislature did not trust to the uncertain operation of economic forces to shift the tax to the purchaser. It did not leave the seller free to meet his sales tax obligation as he chose. It did not even rest content with a hortatory encourgagement to the seller to pass the tax on to his buyer. It imposed this duty on him by law, and made it a penal offense for the seller to absorb the tax or, indeed, even to advertise that he would do so. Accordingly, it seems plain enough that the tax is by law paid by the purchaser, and that the seller's only

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[31] The State Supreme Court appears to have considered the difference between the two types of taxes immaterial in this case. Its opinion barely refers to the incidence of the state tax and stresses the breadth of the exemption in Section 9 (b). See R. in No. 186, at 7, 19 *ff*; R. in No. 187, at 6, 18 *ff*. See also, *Madison Suburban Utility Dist.* v. *Carson*, 191 Tenn. 300 (1950), discussed *infra*, pp. 56-57.

function is that of tax collector for the state. The statute may call the seller the taxpayer but it places the legal incidence of the tax inescapably upon the purchaser.

The Tennessee Supreme Court has itself taken the view that the purchaser's status is determinative, at least where, as here, the purchaser is exempt from such taxation. It is true that, in upholding the validity of the sales tax, it remarked that the tax was a privilege tax upon the seller (*Hooten* v. *Carson*, 186 Tenn. 282, 287, 288 (1948)), but in the same connection it referred to the mandatory passing-on requirements of the statute and quoted from, and relied on, a sales tax opinion of the Supreme Court of Alabama, which, as this Court has noted, holds that its comparable sales tax law imposes a legal obligation on the purchaser to pay the tax. *Alabama* v. *King & Boozer*, 314 U. S. 1, 7.

Whatever may be the meaning of *Hooten* v. *Carson, supra*, the court below held, in a later opinion, that a purchaser who is exempt from taxation need not pay the sales tax, and thus appears to have determined either that (a) the tax is upon the purchaser, or (b) even though the legal incidence of the tax is upon the *seller*, a tax exemption available to the *purchaser* bars imposition of the tax. In *Madison Suburban Utility District* v. *Carson*, 191 Tenn. 300, 303, 307-309, the court held that a statute exempting the Utility

District's "property and revenue" from "all state, county and municipal taxation" exempted the district from the identical sales and use taxation which is involved here. It was held that "since the tax must be determined by its practical effect and operation rather than by particular descriptive language applied to it, the Sales Tax and Use Tax applied by the appellee herein must be held to be nothing more than a direct tax on the revenue of the appellant which is free from taxation under the Act by which the appellant was incorporated". 191 Tenn., at 307-308.

If follows that if, as a matter of federal law, Section 9 (b) applies to taxes initially paid by a contractor on its purchases, Tennessee law does not stand in the way. Either the tax is viewed by the state court as imposing a legal obligation on the purchaser which, of course, cannot be done where the purchaser is exempt. Or under the state law the legal incidence of a tax does not furnish the test for the applicability of that tax where an exemption or immunity from taxation is involved. Under both views, the tax is inapplicable as a matter of state law.[32]

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[32] Petitioner's Rules and Regulations Promulgated in Connection with the Tennessee Retailers' Sales Tax take the position that where the United States is involved the tax cannot be collected. Rule 58 provides:

> In any case where construction material or other tangible personal property is billed and sold directly to, and is paid for by the government of the United States, its departments or agencies, *the State of Tennessee is with-*

3. Finally, we may note that this Court is not controlled by the characterizations or conclusions of the state court, and can decide for itself the true incidence and impact of the tax, if that be deemed relevant in the application of Section 9 (b). *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 443; *United States* v. *Allegheny County*, 332 U.S. 174, 184; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 84; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 674. The terms and structure of the Tennessee act (*supra*, pp. 54, 55-56) require the conclusion that its sales tax, like those of Alabama and North Dakota,[33] imposes a legal obligation on the buyer to pay the tax, which the seller is compelled to add to his sales price and to collect. Cf. *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 43 (City of New York sales tax); *Colorado National Bank of Denver* v. *Bedford*, 310 U.S. 41, 51, 52 (Colorado bank service tax).

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out power to impose the tax on such transactions. The determining factor in all cases is whether or not a sale of tangible personal property is made and billed directly to the Federal Government, its departments or agencies, and is paid for directly by the Federal Government. [Italics supplied.]

[33] See *Alabama* v. *King & Boozer*, 314 U.S. 1, 7; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 98-9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the Supreme Court of Tennessee should be affirmed.

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DECEMBER 1951.

APPENDIX A

1. The Atomic Energy Act of 1946, c. 724, 60 Stat. 755, 42 U.S.C. 1801, provides in pertinent part:

SECTION 1. * * *

(b) PURPOSE OF ACT.—It is the purpose of this Act to effectuate the policies set out in section 1 (a) by providing, among others, for the following major programs relating to atomic energy:

(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;

(2) A program for the control of scientific and technical information which will permit the disseminaiton of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;

(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and

(5) A program of administration which will be consistent with the foregoing policies

and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may hereafter be appropriate.

* * * * * *

SEC. 4. * * *

(b) PROHIBITION.—It shall be unlawful for any person to own any facilities for the production of fissionable material or for any person to produce fissionable material, except to the extent authorized by subsection (c).

(c) OWNERSHIP AND OPERATION OF PRODUCTION FACILITIES.—

(1) OWNERSHIP OF PRODUCTION FACILITIES.—The Commission, as agent of and on behalf of the United States, shall be the exclusive owner of all facilities for the production of fissionable material other than facilities which (A) are useful in the conduct of research and development activities in the fields specified in section 3, and (B) do not, in the opinion of the Commission, have a potential production rate adequate to enable the operator of such facilities to produce within a reasonable period of time a sufficient quantity of fissionable material to produce an atomic bomb or any other atomic weapon.

(2) OPERATION OF THE COMMISSION'S PRODUCTION FACILITIES.—The Commission is authorized and directed to produce or to provide for the production of fissionable material in its

own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts. Any contract entered into under this section shall contain provisions (A) prohibiting the contrator with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 3709 of the Revised Statutes (U.S.C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and partial and advance payments may be made under such contracts. The President

shall determine at least once each year the quantities of fissionable material to be produced under this paragraph.

(3) OPERATION OF OTHER PRODUCTION FACILITIES.—Fissionable material may be produced in the conduct of research and development activities in facilities which, under paragraph (1) above, are not required to be owned by the Commission.

* * * * *

SEC. 9. (a) The President shall direct the transfer to the Commission of all interests owned by the United States or any Government agency in the following property:

(1) All fissionable material; all atomic weapons and parts thereof; all facilities, equipment, and materials for the processing, production, or utilization of fissionable material or atomic energy; all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources (relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

(2) All facilities, equipment, and materials, devoted primarily to atomic energy research and development; and

(3) Such other property owned by or in the custody or control of the Manhattan Engineer

District or other Government agencies as the President may determine.

(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired; except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

* * * * *

SEC. 12. (a) In the performance of its functions the Commission is authorized to—

* * * * *

(5) acquire such materials, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary;

* * * * *

SEC. 15. (a) There is hereby established a Joint Committee on Atomic Energy to be composed on nine Members of the Senate to be appointed by the President of the Senate, and nine Members of the House of Representatives to be appointed by the Speaker of the House of Representatives. In each instance not more than five members shall be members of the same political party.

(b) The joint committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. All bills, resolutions, and other matters in the Senate or the House of Representatives relating primarily to the Commission or to the development, use, or control of atomic energy shall be referred to the joint committee. The members of the joint committee who are Members of the

Senate shall from time to time report to the Senate, and the members of the joint committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are (1) referred to the joint committee or (2) otherwise within the jurisdiction of the joint committee.

* * * * *

SEC. 17. The Commission shall submit to the Congress, in January and July of each year, a report concerning the activities of the Commission. The Commission shall include in such report, and shall at such other times as it deems desirable submit to the Congress, such recommendations for additional legislation as the Commission deems necesary or desirable.

* * * * *

2. The Tennessee Retailers' Sales Tax Act, chap. No. 3, Public Acts of 1947, provides in pertinent part:

* * * * *

SEC. 3. *Be it further enacted,* That it is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item

or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege, a tax is levied as follows:

* * * * *

SEC. 4. * * *

Every "dealer" making sales, whether within or outside the State, of tangible personal property, for distribution, storage, use, or other consumption, in this State, shall at the time of making sales, collect the tax imposed by this Act from the purchaser.

* * * * *

SEC. 5. *Be It Further Enacted,* That:

(a) The privilege tax herein levied, measured by retail sales shall be collected by the dealer from the purchaser or consumer.

(b) Dealers shall, as far as practicable, add the amounts of the tax imposed under this Act to the sales price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail, or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees, of tangible personal property which is subject to the tax imposed by this Act, shall be liable for and pay the tax himself.

(c) When the tax collected for any period is in excess of two per cent (2%) the total tax

collected must be paid over to the Commissioner, less the compensation to be allowed the dealer as hereinafter set forth. This provision shall be construed with other provisions of this Act and given effect so as to result in the payment to the Commissioner of the total tax collected if in excess of two per cent (2%).

(d) Any dealer who shall fail, neglect, or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than One Hundred ($100.00) Dollars or imprisonment in the County jail for not more than three months, or both, in the discretion of the Court.

(e) A person engaged in any business taxable under this Act shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Twenty-five ($25.00), nor more than Two Hundred Fifty ($250.00) Dollars, or imprisonment in the County Jail for not exceeding three months, or both, in the discretion of the court. For a second or subsequent offense the penalty shall be double.

* * * * *

APPENDIX B

UNITED STATES ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

December 26, 1951.

Dear Mr. SOLICITOR GENERAL:

In connection with the Tennessee sales and use tax cases involving cost type contractors of the Atomic Energy Commission which are now pending in the United States Supreme Court, representatives of your office have asked for estimates of the amount of sales and use taxes and business and occupation taxes now in dispute in the various states where the Commission has installations, together with an estimate of the current rate of accrual of such taxes. We do not have accurate figures on the amount of taxes in dispute. However, the following order of magnitude estimates involving cost type contractors of the Atomic Energy Commission may be useful for the purposes of the Department of Justice:

ESTIMATED AMOUNTS NOW IN DISPUTE

Tennessee	
Sales and Use Tax	
Paid and in dispute	$ 3,000,000
Washington	
Business and Occupation Tax	
Paid and in dispute	1,475,000
Use Tax	
Not paid but in dispute	350,000
New Mexico	
Sales and Use Tax	
Not paid but in dispute	56,000

California	
Sales and Use Tax	
Not paid but in dispute	$ 125,000
Indiana	
Gross income tax	
Paid and in dispute	500,000
Estimated Total Amount in Dispute	$ 5,506,000

ESTIMATED CURRENT ANNUAL ACCRUAL RATE

Tennessee	
Sales and Use Tax	
Estimate per year	$ 1,390,000
Washington	
Business and Occupation Tax	
Estimate per year	265,000
Use Tax	
Estimate per year	90,000
New Mexico	
(Currently exempt by administrative interpretation since contractors now operate with advance of Federal funds)	
California	
Sales and Use Tax	
Estimate per year	20,000
Indiana	
Gross Income Tax	
Estimate per year (after Jan. 1, 1952)	550,000
South Carolina	
Sales and Use Tax	
Estimate per year (after Jan. 1, 1952)	3,000,000
Estimated Total Annual Tax	$ 5,315,000

Tax problems involving cost type contractors exist also in several other states but the amount involved does not appear to be large at the present time.

All of the foregoing estimates relate to taxes in controversy since January 1, 1947, the effective date of the Atomic Energy Act. It should also be noted that in many states, these types of taxes are exempt by administrative interpretation of the state laws. If those state laws or the interpretation thereof should be modified, the amount of taxes involved would be substantial.

In addition to the foregoing, the state of Tennessee has claimed various taxes against cost type contractors for the period prior to 1947 including gross receipt taxes on distribution of water and electricity and on bus transportation, bus seat taxes, gasoline taxes and motor vehicle license taxes. Claims for such taxes for the year 1947 to date are contingent upon pending litigation, and if asserted will probably average around one-half million dollars per year.

Sincerely yours,

(Sgd.) EVERETT L. HOLLIS,
General Counsel.

HONORABLE PHILIP B. PERLMAN,
The Solicitor General.

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